In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1340

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 34a) is reported at 313 F. Supp. 181. The opinion of the court of appeals (Pet. App. 1a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1970. The petition for a writ of certiorari was filed on February 11, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly concluded that the district court, in issuing a preliminary in-

418-996—71——1

junction against continuation of an alleged unlawful strike against the United States by air traffic controllers, abused its discretion by imposing conditions which barred the government, *pendente lite,* from disciplining the strike participants.

STATUTES INVOLVED

5 U.S.C. (Supp. V) 7311 provides:

> An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—
>
> * * * * *
>
> (3) participates in a strike * * * against the Government of the United States or the government of the District of Columbia; * * *
>
> * * * * *

18 U.S.C. 1918 provides:

> * * * Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—
>
> * * * * *
>
> (3) participates in a strike * * * against the Government of the United States or the government of the District of Columbia * * *
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> * * * * *
>
> shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both.

STATEMENT

On March 25, 1970, a large number of government-employed air traffic controllers throughout the nation were absent from work; their absence disrupted air traffic and curtailed military training programs. The government promptly filed actions in seventeen different district courts throughout the country, including this suit in the Eastern District of New York, to enjoin continuance of an unlawful strike against the United States in violation of 5 U.S.C. 7311.

In the instant case, after a hearing, the district court in May 1970, issued a preliminary injunction (Pet. App. 65a–68a) against both the controllers and the government. The controllers were enjoined:

> (a) From in any manner continuing, encouraging, ordering, engaging, aiding or taking any part in any strike, work stoppage or slowdown or any interference with or obstruction to the movement or operation of any aircraft in air commerce or air transportation at any traffic facility operated by the Federal Aviation Administration, or interference with or obstruction to the application of the safety standards or procedures established by the Federal Aviation Administration for the regulation and control of air traffic in the United States of America;
>
> (b) From in any manner interfering with or obstructing the orderly continuance of air traffic in the United States;
>
> * * * * *

The preliminary injunction directed the Federal

Aviation Administration until further order of the court:

> (a) To restore all defendants in the action who have returned to work to the performance of the duties to which they were assigned prior to March 25 * * *;
> (b) To withhold any further administrative actions in respect of suspension, removals or any other sanctions based upon the alleged work stoppage between March 25, 1970 and April 14, 1970, against any employees who are defendants in these actions and subject to the temporary injunction issued by this court.

The district court agreed that the government had proven "a prima facie case of an illegal work stoppage" (Pet. App. 44a). It imposed restrictions upon disciplinary action against the striking employees because "[i]t seems * * * rather incongruous in this case for the government to ask the court to compel the defendants to return to work and then immediately transfer them to different jobs and serve notice of intention to discharge. * * *" (Pet. App. 47a).

The United States filed an interlocutory appeal under 28 U.S.C. 1292(a)(1) from the adverse portion of the district court's preliminary injunction. In December 1970, the court of appeals, finding that the district court had abused its discretion, vacated that part of the injunction (Pet. App. 1a). The court observed that "[d]iscipline based upon the finding that the employees' work stoppage was unlawful is clearly within the power of the administrative agency. If the agency's action in any individual case should prove

to be arbitrary or capricious it would be subject to administrative and eventually judicial review" (Pet. App. 4a–5a). The court of appeals further noted that "[d]isciplinary action by the agency will not impair the ability of the court to make a proper decision as to whether a permanent injunction should be granted, if called upon to do so" (Pet. App. 6a).

ARGUMENT

The decision of the court of appeals is correct. In the present posture of the case, moreover, there is no issue of practical significance which warrants review by this Court.

1. In 5 U.S.C. 7311 Congress provided:

> An individual may not accept or hold a position in the Government of the United States * * * if he * * * participates in a strike * * * against the Government of the United States * * *.

Violation of this statute is a criminal offense. 18 U.S.C. 1918. In issuing its preliminary injunction the district court required the government to restore striking controllers to their former jobs and barred the imposition of any disciplinary action, despite its conclusion that the United States had presented prima facie evidence of an unlawful strike. This ruling directly contradicts the statutory framework.

Furthermore, the controllers failed to show the likelihood of irreparable injury necessary to support injunctive relief. If a controller is improperly disciplined, he may challenge the discipline in appropriate administrative proceedings which ultimately

are subject to judicial review. If he proves that the discipline was improper, he is entitled to reinstatement and back pay. 5 U.S.C. (Supp. V) 5596. See, *e.g., Pelicone* v. *Hodges,* 320 F. 2d 754 (C.A.D.C.)[1]

Nor can the district court's ruling be justified as necessary to preserve its jurisdiction *pendente lite.* Regardless of whether disciplinary sanctions were imposed upon the controllers, the district court would have jurisdiction to decide the issue before it of whether the government was entitled to permanent injunctive relief. In light of the lack of a showing of irreparable harm and of need to protect its jurisdiction, the district court abused its discretion by thwarting the enforcement of the statute, as the court of appeals held.

2. The great majority of courts in which the United States sought to enjoin the controllers' strike refused to limit the government's disciplinary authority as the district court did in this case. A minority of the district courts did so, and the Government appealed such *pendente lite* restrictions in *United States* v. *Moore* (D. Colo.) (consolidated with *United States* v. *Abnet* (D. Colo.)), 427 F. 2d 1020 (C.A. 10), and *United States* v. *Plasch* (N.D. Ill.), C.A. 7, No. 18574.[2]

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[1] The validity of the administrative procedures is not being challenged in the instant case. Certain air traffic controllers are challenging those procedures in *Leyden* v. *Federal Aviation Administration,* 315 F. Supp. 1398 (E.D. N.Y.), where the dispute arises out of a 1969 work stoppage.

[2] Limitations on the government's disciplinary authority were also imposed in *United States* v. *PATCO,* No. 381–70 (D. N.J.) and *United States* v. *West,* No. 70–377, (W.D. Pa.) (since dismissed by district court, defendants' appeal pending, C.A. 3, No. 19,072.).

The first appellate decision on this issue was *United States* v. *Moore, supra,* decided on June 8, 1970. The Court of Appeals for the Tenth Circuit did not render a majority opinion in that case. It upheld, 2–1, the validity of the conditions imposed against the United States. That decision thus is not entirely consistent with the decision of the court of appeals below. However, events subsequent to the *Moore* decision have eliminated the practical significance of the issue. Further review by this Court, therefore, is not warranted.

Judge Lewis, who voted to affirm *Moore,* concurred solely on the ground that it was inconsistent for the United States to seek to impose disciplinary sanctions at the same time it "persists in seeking a judicial determination in this action that the employee action was illegal." 427 F. 2d at 1025. He suggested that if the government wished the restrictions dissolved, it "should seek to have the preliminary injunction dissolved as having served its purpose and should withdraw its petition for a permanent injunction." *Id.*

Following the decision, the government moved in the district court in *United States* v. *Moore, supra,* and the companion case of *United States* v. *Abnet, supra,* to dismiss its suits since the strike had ended and injunctive relief was no longer practically necessary. These motions were granted.

A comparable development took place in the Seventh Circuit. In *United States* v. *Plasch, supra,* the District Court for the Northern District of Illinois refused to dismiss the case. On the government's appeal from the

restrictions of the preliminary injunction, the court of appeals initially upheld the district court (Order of July 10, 1970) but on rehearing it ordered dismissal of the case.[3] On the remand in *Plasch* the district court granted the government's motion to dismiss.

The government has filed similar motions to dismiss in district courts throughout the country. They have been granted in the overwhelming majority of cases.[4]

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[3] The court of appeals' order on rehearing, not reproduced by petitioners, is printed in an appendix to this brief at p. 11, *infra*.

[4] The status of the suits (aside from this one) brought by the United States is the following:

a. Dismissed by district court on government's motion

1. *United States* v. *PATCO*, No. C-61-70 (D. Utah)
2. *United States* v. *Moore*, *supra* (D. Colo.); *United States* v. *Abnet*, *supra* (D. Colo.)
3. *United States* v. *Plasch*, *supra* (N.D. Ill.)
4. *United States* v. *PATCO*, No. S-1577 (E.D. Calif.); *United States* v. *Boylan*, No. S-1588 (E.D. Calif.)
5. *United States* v. *PATCO*, No. 70-670-R (C.D. Calif.)
6. *United States* v. *PATCO*, No. A-40-70 (D. Alaska)
7. *United States* v. *PATCO*, No. LV-1419 (D. Nev.)
8. *United States* v. *PATCO*, No. 3-70-76 (D. Minn.)
9. *United States* v. *PATCO*, No. KC-3129 (D. Kans.)
10. *United States* v. *PATCO*, No. C-70-668-REP (N.D. Calif.)
11. *United States* v. *PATCO*, No. CA-4-1425 (N.D. Tex.)
12. *United States* v. *PATCO*, No. 908-70 (D.D.C.)
13. *United States* v. *West*, No. 70-377 (W.D. Pa.), appeal pending, C.A. 3, No. 19072

b. Pending in district court on government's motion to dismiss

15. *United States* v. *PATCO*, No. C-70-320 (N.D. Ohio)
16. *United States* v. *PATCO*, No. 147-70-A (E.D. Va.)

c. District court has denied government's motion to dismiss

17. *United States* v. *PATCO*, No. 381-70 (D. N.J.)

Since the instant case was on appeal to the Second Circuit at the time the government decided in light of the decision in *United States* v. *Moore, supra,* to move to dismiss its suits, the government has not yet had the opportunity to file a motion to dismiss here. Such a motion will be filed as soon as this case is back in the district court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1971.

APPENDIX

United States Court of Appeals for the Seventh Circuit, Chicago, Illinois 60604

October 16, 1970

No. 18574

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

WILLIAM J. PLASCH, ET AL., DEFENDANT-APPELLANTS.

Appeal from the United States District Court, Northern District of Illinois

Before Hon. Luther M. Swygert, Chief Judge, Hon. Roger J. Kiley, Circuit Judge, Hon. Walter J. Cummings, Circuit Judge

ORDER

On consideration of the petition for reconsideration and the answer thereto, this Court concludes that the Federal Aviation Agency is presently the appropriate forum to consider the remaining contentions of the parties. Therefore, the petition is granted, with directions to the District Court to dismiss this action.

U.S. GOVERNMENT PRINTING OFFICE: 1971